No. 91-1030

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAMELA WITHROW,

Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DO THE FEDERAL COURTS ON HABEAS CORPUS REVIEW OF A STATE COURT CONVICTION HAVE JURISDICTION TO FIND A PETITIONER'S STATEMENT INVOLUNTARY WHERE THE ONLY FIFTH AMENDMENT ISSUE RAISED IN THE STATE COURT, AND IN THE HABEAS PETITION, WAS WHETHER THE STATEMENT WAS ADMITTED IN VIOLATION OF THE PROPHYLACTIC MIRANDA RULES, THE STATE HAVING FOUND THAT THE PETITIONER WAS NOT IN CUSTODY?

IF SO, WHERE THE PREMISE OF THE FIFTH AMENDMENT RULING IS A FINDING OF A MIRANDA VIOLATION, WHERE THE PETITIONER HAS HAD ONE FULL AND FAIR OPPORTUNITY TO RAISE THE MIRANDA CLAIM IN STATE COURT, SHOULD COLLATERAL REVIEW OF THE SAME CLAIM ON A HABEAS CORPUS PETITION BE PRECLUDED?

IF NOT, IS A CONFESSION WHICH FOLLOWS MIRANDA WARNINGS INVOLUNTARY MERELY BECAUSE THE POLICE INDICATE THE POSSIBILITY OF LENIENT TREATMENT IF THE ACCUSED TELLS THEM THE TRUTH; AND IF SO, WOULD ADOPTION OF SUCH A RULE ON HABEAS CORPUS VIOLATE THE PRINCIPLES OF SAWYER V SMITH, ___ US ___; 110 S Ct 2822 (1990) AND TEAGUE V LANE, 489 US 288 (1989)?

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, Jr.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this cause on September 11, 1991, rehearing denied on October 3, 1991, judgment entered on October 11, 1991.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 171 Mich App 234; 429 NW2d 649 (1990), and appended below as Appendix F; the order of the Michigan Supreme Court denying Respondent leave to appeal is reported at 432 Mich 911 (1990); the order of this Court denying a Petition for writ of certiorari is reported at ___ US ___; 110 S Ct 369 (1989); the order of the District Court granting the Petition for writ of habeas corpus is unreported as yet, and appended below as Appendix D; the opinion of the Sixth Circuit Court of Appeals affirming issuance of the writ is unreported as yet, and appended below as Appendix A; the order of the Sixth Circuit denying rehearing is unreported, and appended below as Appendix B; the Judgment of the Sixth Circuit is unreported, and appended below as Appendix C.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appealas issued its opinion on September 11, 1991, denied rehearing on October 3, 1991, and entered judgment on October 11, 1991. This Court's jurisdiction is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall...be compelled in any criminal case to be a witness against himself...."

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 29, 1985, following a bench trial, the state trial court convicted Respondent of two counts of first-degree murder, and two counts of felony firearm. On November 6, 1985, the court sentenced Respondent to two concurrent terms of life imprisonment for murder, and two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, following an evidentiary hearing, the trial court vacated one felony firearm count, and denied Petitioner's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Respondent's convictions in a published opinion. 171 Mich App 234; 429 NW2d 649 (1988). Respondent had raised three issues in the appeal: a constitutional claim that the police had failed to give him Miranda

warnings; ineffective assistance of counsel; and the adequacy of the trial court's fact findings. On June 9, 1989, the Michigan Supreme Court denied Respondent leave to appeal; Respondent had raised only the Miranda and ineffectiveness issues in this application. Docket No. 84294, 432 Mich 911 (1989). On November 9, 1989, this Court denied Respondent's petition for writ of certiorari. Docket No. 89-5191, cert den ___ US ___; 110 S Ct 369; 107 L Ed 2d 355 (1989). Petitioner had raised only the Miranda issue in his petition.

On or about December 7, 1989, Petitioner filed the instant petition for writ of habeas corpus with the District Court. Docket No. 90CV-70256-DT. Respondent claimed three grounds for issuing the writ: a violation of his Miranda rights; a claim that counsel was ineffective for failing to discuss plea bargain offers with him prior to trial; and inadequate fact

findings by the trial court. On October 29, 1990, the District Court issued an order, supported by a 33-page written opinion, ordering Respondent's conviction reversed on the following grounds: (1) the state trial court erred in holding that Respondent was not in police custody during his initial statement to police, and that Miranda warnings were therefore not required; and (2) his subsequent statements to police, though preceded by Miranda warnings, were coerced through promises of leniency and were involuntary. The District Judge held that the admission of these involuntary statements into evidence at trial required the reversal of Respondent's conviction. The Distict Court entertained no argument before issuing its ruling, and conducted no independent evidentiary hearing. However, the court appeared to base its conclusion on passages cited in two audiotapes, labelled "Rights in Office," Appendix, xxa (Slip

Opinion, p 19), and "Video," Appendix, xxa (Slip Opinion, pp22-23). These two tapes comprised what the District Court described as the "second interrogation session," following the recitation of Miranda warnings, and formed what the District Court called the "critical question" in the case." Appendix, xxa (Slip Opinion, pp 20). Although finding the evidence against Respondent "substantial," the District Court determined that the admission into evidence of the statements was not "harmless beyond a reasnoable doubt." __a; (Dist Ct Slip Opinion, pp 24-27, 32).

The state court record of the proceedings discloses the following:

Following an evidentiary hearing, and in a written opinion issued on September 27, 1985, the state trial court granted Respondent's motion to suppress his latter two statements, holding that the police did

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not have probable cause to arrest him following his initial statement, and that holding him in jail rendered his subsequent statements inadmissible on Fourth Amendment grounds. Concerning the initial statement, and the two statements ordered suppressed, the trial court made the following relevant findings of fact:

> "Romulus police officers investigating two apparent murders heard that Defendant might have information about the decedents. They were admitted to Defendant's house by his mother on April 10. He was searched but not handcuffed, and asked to come to the police station for questioning. He was not placed under arrest, but agreed to come with them and to answer questions. After approximately 40 minutes of questioning at the police station, Defendant began to implicate himself. He waived his rights and the questioning continued. He was questioned a second time on April 10, after Miranda warnings and his waiver of rights. Defendant was then lodged in jail. He was given a polygraph examination and questioned a second time on April 11. He was questioned again on the morning of April 12, and was arraigned that afternoon."

The trial court record shows that defense counsel requested that the court listen to the tape of Respondent's statement at trial, and suggested playing the tape in its entirety. The single audiotape, comprising Plaintiff's Exhibit #10, was of Respondent's initial statement to police, on April 10th, and was the only statement of Respondent's admitted at trial. While it is unclear from the existing record, it appears that this tape consisted of the initial, pre-Miranda statement, and the post-Miranda statement of April 10th; no reference is found on the trial court record to the existence of a second audiotape.

On appeal, the Sixth Circuit affirmed the issuance of the writ. While acknowledging that the district court's opinion "inexplicably does not mention that the April 11 and 12 statements had already been excluded by the state trial court," the Circuit Court held that "our conclusion that

the inculpatory statements made on April 10 should have been excluded still mandates a new trial," approving of the District Court's finding "that the admission of the April 10 statements was not harmless error." The Circuit Court did not note that District Court's harmless error analysis appeared to be directed largely to those statements, outside of Plaintiff's Exhibit #10, which were not admitted into evidence at Respondent's trial.[1]

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[1] See Opinion of the District Court, xxa n 8 -- noting the second tape from April 10 and concluding, in the absence of an evidentiary hearing, that "[a]lthough it has been given a different title and is on a separate tape it should probably be considered a continuation of the same interrogation session recorded on the 'Rights in Office' tape" and noting that "[a]lthough the tape is labelled 'Video,' it does not follow the interrogation session recorded on videotape. The videotaped session is dated April 12, 1985."

The only tape admitted at trial was Exhibit 10. However, in the absence of

Petitioner now seeks certiorari.

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[1] Continued
an evidentiary hearing, Petitioner is at a loss to explain -- or to dispute -- how the lower courts have all based their determination of reversible error of material contained in the other tapes. And in the absence of a testimonial record on the question of voluntariness, Petitioner will not speculate upon the existence of other evidence relating to Respondent's reasons or motivation for making his April 10th statement.

REASONS FOR GRANTING THE WRIT

As this Court will note from a review of the opinion and appendix, this case is not a textbook example of jurisprudence at its finest: though feeling an "inevitable and understandable reluctance," __a, to order a new trial, and despite "substantial" evidence at trial, __a, the district judge failed to notice that two of the three confessions mentioned in her opinion as leading her to grant a new trial were never introduced into evidence; the Circuit Court of Appeals, though noting that the district court's opinion on this point "inexplicably" overlooks this point, took Petitioner's concession about exhaustion on a Miranda issue to be a concession on a voluntariness issue; and, neglecting to note that the question of voluntariness had never been the subject of an evidentiary hearing, that Court proceeded to affirm on grounds that the police offer to release Respondent if he

was telling the truth and passed a polygraph was "intended to induce [Respondent]'s admissions," __a, and rendered the admission involuntary. Thus, the Court reasoned, as involuntary statements are not admissible under this Court's holding in Oregon v Elstad, 470 US 298; 105 S ct 1285; 84 L Ed 2d 222 (1985) by the mere recitation of Miranda warnings, and the trial court committed "no error in the district court's grant" of the petition. __a. Slip Opinion, p 1.

Ordinarily, such mistakes by a lower court on direct review -- even those leading to the gratuitious release of a convicted murderer -- may well be of little interest to this Court, as they involve isolated errors in applying otherwise clearly defined rules. However, the mistakes in this case, which occurred on collateral attack of a state court conviction which had been thoroughly reviewed by the state judiciary,

are symptomatic of a larger problem in our criminal justice system: the widespread and growing nature of federal involvement in state court criminal proceedings. Petitioner suggests that this case provides a classic vehicle for the Court to review three vital areas of federal habeas corpus practice, and intervene in three areas of critical importance to American criminal jurisprudence:

A.

AN ISSUE IS NOT "FULLY AND FAIRLY" PRESENTED FOR STATE COURT REVIEW AND DECISION WHEN THE DECISIVE ASPECT OF THE ISSUE IS RAISED NEITHER IN STATE COURT NOR IN A PETITION FOR COLLATERAL RELIEF, BUT IS FIRST RAISED IN THE DISTRICT COURT'S OPINION GRANTING FEDERAL HABEAS RELIEF.

It is well settled that federal courts have no supervisory power over state courts, and that considerations of comity and finality preclude federal intrusion into

state judicial proceedings except when necessary to correct wrongs of constitutional dimension. Harris v Rivera, ___ US ___; 102 S Ct 460; 70 L Ed 2d 530 (1981). In addition, this Court has clearly held that before presenting such a claim to the federal courts, a state court defendant must first afford the state a "fair opportunity" to apply the controlling legal principles involved in the substance of his habeas claim. Anderson v Harless, 459 US 4, 6-8; 103 S Ct 276; 74 L Ed 2d 31 (1982); Picard v Connor, 404 US 270, 276-277; 92 S Ct 509; 30 L Ed 2d 438 (1971).

In this case, despite the Sixth Circuit's langauge to the contrary, Respondent has never conceded that any Fifth Amendment issue of voluntariness was ever presented: rather, Respondent conceded only that the Fifth Amendment claim relating to the Miranda issue was presented to the state court for resolution. And, in point of

fact, the record discloses that the only challenge to the statements ever presented in state court were challenges premised on Miranda, which was denied,[2] and the Fourth Amendment, which was sustained. Voluntariness was neither contested nor raised as an issue in the state court -- and, Petitioner was never on notice that voluntariness would be an issue, until the district court issued its opinion granting the writ.

Accordingly, it is clear that the ground relied upon by the District Court and Sixth Circuit to justify overturning

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[2] With due respect to the lower courts, Petitioner is also at a loss to explain how the District Court could accord the presumption of correctness to a written opinion that it neither cited nor acknowledged in its opinion -- and which would have informed that court that two of the three "improperly admitted" confessions relied upon as grounds for overturning Respondents first-degree murder convictions were already suppressed on other grounds. Cf, Sumner v Mata, 455 US 591; 102 S Ct 1303; 71 L Ed 2d 480 (1982).

Respondent's conviction was not properly before the Court. While such a clear error in the application of clear legal principles might not justify this Court's attention, it matters a great deal to the State of Michigan, and Petitioner hopes that this Court will not be tempted to overlook its supervisory responsibilities simply because of the blatancy of the lower courts' mistake. Therefore, Petitioner requests this Court's intervention, to correct a clear mistake by the Sixth Circuit.

Even so, this mistake is not the only reason this particular case might warrant the Court's attention. If we delve beyond the District Court's threshhold error in reviewing a claim never presented to any court, there are two additional aspects of this case that make it an appropriate vehicle for exploring the parameters of habeas corpus review.

B.

THIS COURT SHOULD APPLY THE RULE IN STONE V POWELL, 428 US 465 (1976) TO CLAIMED VIOLATIONS OF THE FIFTH AMENDMENT.

Secondly, though the Sixth Circuit summarily dismissed the point, the fact remains that Respondent has already had the opportunity, and the occasion, to have full review of the federal issues presented on direct appeal: in Williams v Michigan, ___ US ___; 110 S Ct 369; 107 L Ed 2d 355 (1989), following his state court appeals, this Court denied Respondent's petition for writ of certiorari, in which he raised the federal aspects of his direct appeal. For the entire federal court system to litigate this point anew is a waste of judicial resources; and as the federal district judge was the first to find any fault with the findings or procedures of the State courts -- after review by eleven state court judges, and the nine Justices of this Court

-- it is an illustration of why the existing method of federal review is in dire need of revision.

In Stone v Powell, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976), this Court confronted a similar problem: in the context of Fourth Amendment claims, the Court held that collateral relief, by way of federal habeas proceedings, was unavailable to those state court criminal defendants wishing to raise Fouth Amendment claims, where those defendants have had a full and fair opportunity to raise those claims in the state court proceedings. Plaintiff urges that this Court consider applying a similar rule in this case, and suggests that this case provides a classic example of the need for such a rule: federal judicial resources are no less valuable than those of the state -- and federal courts are just as likely to blunder. Moreover, the mistakes involved in federal adjudication of this

matter should give pause to those who claim that federal courts are needed to protect state prisoners from the abuses of their own state government.

In this case, eleven state court judges, and the nine justices of this Court, all declined to disturb the trial court's determination that Defendant was not "in custody" for purposes of Miranda until the police formally advised Respondent of his constitutional rights. In the absence of a demonstration of the manner in which the State prevented Respondent from litigating the point once, this Court should not permit him a second chance to contest the matter. Applying a Stone v Powell-rule to Fifth Amendment determinations would go a long way toward streamlining the already cumbersome procedures for incarcerating criminals in this country -- without sacrificing the principle of appellate review, which remains our primary safeguard against unjust or

unlawful imprisonment. And it would go equally far toward repairing the converse danger -- the eroding ability of government to impose a modicum of law and order upon our streets.

Two members of this Court have already indicated an interest in examining the application of Stone v Powell, supra to cases involving the Fifth Amendment.[3]

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[3] At the risk of confusing the Court, Petitioner will attempt to duplicate the reasoning by which the lower courts converted a legitimately-raised Miranda claim into a never-litigated voluntariness claim:

> Though Respondent did not raise a voluntariness challenge to the introduction of his statement, he did raise a Miranda challenge, which the court rejected. Given the fact that the district court reached a different result on the Miranda challenge, the district judge had to consider the impact of this Court's holding in Oregon v Elstad, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), holding that giving Miranda-warnings cured any Miranda defect, and would not taint a subsequent statement which merely reiterated a Miranda-defective

See, Duckworth v Eagan, 492 US 195; 109 S Ct 2875; 106 L Ed 2d 166 (1989)(O'Connor, J, concurring). See also, Robinson v Borg, 918 F2d 1387, 1402-1404 (CA 9, 1990(Trott, J, dissenting). Petitioner suggests that the time is ripe for the full Court to consider such a rule.

C.

A CONFESSION IS NOT INVOLUNTARY MERELY BECAUSE INDUCED BY THE POSSIBILITY OF FUTURE LENIENCY; AND RELIEF ON SUCH GROUNDS IS PRECLUDED ON COLLATERAL REVIEW UNDER TEAGUE v LANE, 489 US 288 (1989) and SAWYER v SMITH, ___ US ___; 110 S Ct 2822 (1990).

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[3] Continued
confession. However, Elstad has no application to subsequent involuntary statements; and therefore, giving tardy Miranda warnings to Respondent did not cure the original error, and did not render the subsequent statement admissible.

Though there may well be a reason for distinguishing between Fifth Amendment voluntariness claims, and

Lastly, the major premise of the lower courts is that Respondent's statements to police were involuntary. Specifically, the Sixth Circuit[4] noted that the one statement actually introduced into evidence

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[3] Continued
Fifth Amendment Miranda claims for purposes of asserting a Stone v Powell rule on collateral attack, this Court may address the point during plenary review -- and, if necessary, remand the cause to the District Court for an inquiry into whether Respondent fully and fairly raised the voluntariness portion of his Fifth Amendment claim to the state courts.

[4] Though difficult to discern upon a first reading, the precise reasoning of the lower courts appears to be as follows: the state court erred in determining that Respondent was not in custody before he was given Miranda warnings, and that such warnings actually were required a few minutes earlier -- when, after telling Respondent that they thought he was at the scene of the crime but that were interested in finding the shooter, the interrogating officer confronted Respondent with the following choice: "[Y]ou can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove

came after the police had told Respondent that if he was telling them the truth, was not involved in the shooting, and passed a polygraph to confirm his innocence, he would not be charged with the crime -- and found such a representation to be "objectively coercive police activity...sufficient to overbear the will of the accused." __a

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[4] Continued
differently." --a; --a. (District Court Slip Opinion, p 11; 6th Circ. Slip Opinion, p 8).

Noting the holding in Oregon v Elstad, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), the District Court held Elstad to be inapposite because the ensuing statement in that case was voluntary, while the statement in this case was involuntary because it was induced by the police promise that -- if Respondent was telling them the truth, and passed a polygraph test -- he would not be charged with the homicide, since he would not be the shooter. __a; __a (District Court Slip Opinion, pp 19-20; 6th Circuit Slip Opinion, pp 9-10). Respondent then admitted to being present at the scene -- and, in several subsequent statements, later held inadmissible on Fourth Amendment grounds, made further damaging admissions.

(Slip Opinion, p 10), citing McCall v Dutton, 863 F2d 454, 459 (CA 6, 1989) cert den 490 US 1020 (1989).

Such a holding appears to conflict with the common-sense notion that, in the absence of an assertion of the Fifth Amendment right to cut off questioning, the police have every right to try to convince someone to speak to them. See, eg, Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confession Law, 84 Mich L Rev 662, 666 (1986). And if we survey the holdings of other jurisdictions, we find little support for such a proposition.

Generally, courts look not to the bare language of the inducement, but to the nature of the benefit to be derived if the defendant chooses to speak, to determine questions of voluntariness. People v Johns, 145 Cal App 3d 281; 193 Cal Rptr 182 (1983).

A mere promise that a purported informant will be "taken care of," in the absence of a more concrete understanding, will not support a claim that a confession was wrongly induced by a promise. Tyson v State, 165 Ga App 222; 299 SE2d 69 (1983). And the mere promise of fair treatment, People v Brewer, 720 P2d 583 (Colo App, 1985), or of bringing any cooperation to the attention of the prosecutor or court, United States v Packer, 730 P2d 1151 (CA __, 1984), will not support a finding of involuntariness. Most jurisdictions view a promise as merely one factor, amid a totality of circumstances, in determining whether a statement is voluntary or coerced. People v Saunders, 135 Ill App 3d 594; 482 NE2d 85 (1985); People v Conte, 421 Mich 704; 365 NW2d 648 (1984). But see, State v Kase, 344 NW2d 223 (Iowa, 1983). And the proper inquiry is not whether the government in some way induced the statement, but rather the inducement creates an unacceptable

pressure that a person, wishing not to confess, will do so in order to remove the pressure to do so. Cf, Dixon v State, 624 SW2d 373 (Tex App, 1981). See also, Grano, Free Will, Voluntariness, and the Law of Confessions, 65 Va L Rev 859 (1979).

Moving to those cases presenting the closest factual parallels to this one, we find little support for the Sixth Circuit's ruling: in United States v Mast, 735 F2d 745 (CA 2, 1984), the Second Circuit held that a governmental promise not to institute criminal proceedings if a fraudulent loan were repaid did not bar the use of ensuing statements at subsequent criminal proceedings, where the defendant never repaid the loan. Similarly, in Commonwealth v Saya, 17 Mass App 921; 456 NE2d 764 (1983), Massachussets rejected the claim that a promise not to execute outstanding warrants for a defendant on unrelated charge in exchange for his cooperation on the case

at bar presented no Fifth Amendment basis for suppressing statements as a result. And in People v Pinkham, 139 Ill App 3d 554; 487 NE2d 707 (1985), Illinois held that a police officer's truthful response to a defendant's questions concerning the possibility of murder charges did not constitute coercion sufficient to support a finding of involuntariness.

Petitioner submits that intimations of leniency, of the type found on this record, do not constitute "coercion" within meaning of the Fifth Amendment, so as to render confession involuntary: the tentative nature of the police representations to Petitioner -- limited by their insistence that Respondent telling them the truth about his level of criminal involvement in the homicide -- bear scant relation to the ordinary meaning of the word "coercion."[5]

[5] See, eg, Webster's Third New International Dictionary of the English

And it would be an odd rule of law that prohibited the police from reassuring reluctant witnesses that -- so long as the speak the truth -- they have nothing to fear from their Government. The implications of such a rule would, after all, bring all guilty pleas within the ambit of "involuntary" admissions of guilt, by mistaking one's motivation to speak for coercion. Moreover, even if this Court were to look favorably upon such a rule, the extension of the concept of "coercion" in such a manner would constitute a new rule of law, which is unavailabe to a petitioner on collateral review. Teague v Lane, 489 US 288 (1989); Sawyer v Smith, ___ US ___; 110 S Ct 2822 (1990).

[5] Continued
Language (Unabridged), (1966), p 439: "coercion:...[the] use of physical or moral force to compel to act or assent...."

Clearly, the lower courts have misapplied this Court's precedents. To prevent future confusion in the area, this Court should intervene to resolve the conflict.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Sixth Circuit Court of Appeals, and reinstate Respondent's state court conviction for first-degree murder.

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Dated: November 20, 1991
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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT ALLEN WILLIAMS, JR.,

Petitioner,

v

PAMELA WITHROW,

Respondent.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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OPINION

Decided and Filed September 11, 1991

Before: JONES and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

JONES, Circuit Judge. Appellant Pamela Withrow, the warden of the Michigan Reformatory, appeals from an order of the district court granting the habeas corpus petition of Robert Allen Williams, Jr. As we discern no error in the district court's grant of Williams' habeas corpus petition, we affirm.

I

On April 6, 1985, police officers in Romulus, Michigan discovered two males shot to death in a parked car. Responding to a rumor, Detective Sgt. David Early of the Romulus Police Department went to Williams' house to question him on April 10, 1985. At the house, Williams was searched but not handcuffed, and was asked to accompany Sgt. Early to the police station. When Williams arrived at the police station, he was questioned by Sgt. Early and his partner, Sgt. Ondejko. Williams was not given **Miranda** warnings before this first round of questioning. After Williams denied having any information about the murders, Early told Williams that "the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the

shooter on this and we're gonna pretty well be content." Williams continued to deny being present at the scene, prompting Early to state:

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove differently. We're not playing. We've been chasing around on this too fuckin' long.

Sgt. Early then gave Williams the choice of answering his questions or being formally charged. Sgt. Early also told Williams that he had "big problems", that the police were close to issuing an arrest warrant for him, and that the police knew of witnesses who would testify against Williams. At this point, Williams admitted that he had provided the murder weapon because he wanted to sell the gun, and that the murderer had called him after the crime and told him

he had discarded the gun and his clothes in the river. Questioning continued, with the police again insisting that they were only interested in finding the shooter. Williams again denied being present at the scene of the crime. Sgt. Early later testified that the April 10 interrogation proceeded for "approximately 35 to 40 minutes" before Williams was read his Miranda rights. Williams was questioned a second time on April 10, 1985, and again on April 12 session, and Williams indicated his understanding of his rights.

At the second interrogation on April 10, the following exchange took place between Williams, Sgt. Early, and Sgt. Onjejko:

> Ondejko: Do you wish to change your story?
>
> Williams: What difference is it going to make?

> Ondejko: It's gonna make a lot of difference to you.
>
> Early: I told you. If you told the truth...
>
> Williams: I've been telling you the truth.
>
> Early: Oh, you've been making up fairy tales ever since you've been in here. You're giving us, like he says, parts of the truth, parts of what you want us to believe, and part of what really happened.
>
> Williams: If I tell you everything that happened, I'm gonna walk outta here, huh?
>
> Ondejka: Someday you may stand a chance of walking.
>
> Early: I'll make you a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk.

Following this exchange, Williams admitted driving Mark Sennett, identified as the shooter, to the scene of the murders following behind the victim's car. He also admitted that he turned his car around at the request of Sennett, that he heard shot and muzzle flashes, and that he drove Sennett away from the

scene and helped dispose of Sennett's clothing and the murder weapon. Williams denied knowing that Sennett was going to kill the two victims.

Officer Early then elaborated on the deal with Williams:

> Early: You're worried now about us turning this around on you and charging you too. We've said that basically we want you as a witness. Right?
>
> Williams: Yes.
>
> Early: Alright, I'm gonna tell you right now, at the start of the recording, if we use this recording against you, it's got to be in its entirety. We can't edit it or cut it. We told you if you are a witness to this and if you are telling the truth, and if you are willing to testify, then we are not going to charge you as a co-defendant. That's what we told you, right?
>
> Williams: Yes.
>
> Early: Alright. We're still gonna go by that agreement. And I don't. [Abrupt stop.] You've been around, but if, whether you're up on the law, if a police officer makes an agrement like that it's got to be

> honored. You can go to court and say we made that agreement and we backed down on it and we can't present these tapes and use anything else we've got. So it's an agreement we have to stick to by law. I can't promise you anything and them turn around and back out of it and use it against you.
>
> Williams: O.K.
>
> Early: Right now you're witness to the crime. But we want the truth. If you start lying to us and you start playing games, yeah, we're gonna charge you. A witness doesn't do us any good unless he tells the truth. We're not trying to hang anybody with any made up testimony or anything but the truth. After you're done with this, we still gonna put you on a polygraph and you're gonna have to show us you're telling the truth . So that's the deal. You're telling the truth and you're not being charged. That fair enough?
>
> Williams: Yeah.

On October 29, 1985, Williams was convicted of two counts of felony firearm charges in the Circuit Court of Wayne County. The state trial court excluded the statements from April 11 and 12 as "improperly obtained" under Michigan caselaw because the delay in actually arresting Williams was "used as a tool to

extract the statements". On September 7, 1988, the Court of Appeals of Michigan affirmed Williams' conviction. People v Williams, 171 Mich. App. 234, 429 N.W.2d 649 (1989). The Michigan Supreme Court denied leave to appeal, and the U.S. Supreme Court denied certiorari. 110 S. Ct. 369 (1989). On January 31, 1990, Williams filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan.

The district court first found that Williams was in custody as of the moment on April when Sgt. Early gave him a choice between answering questions or being charged. As a result, Williams should have been given his **Miranda** warnings at that point. Instead, however, the police continued their questioning without giving **Miranda** warnings, and Williams made inculpatory statements. Williams made further

inculpatory statements after **Miranda** warnings were finally given some forth minutes into interrogation.

The district court evaluated the admissibility of these post-**Miranda** statements under Oregon v. Elstad, 470 U.S. 229 (1985). Elstad held that there is no presumption of coercion when a suspect makes incriminating statements following earlier, unwarned statements. In that situation, "the relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." Elstad, 470 U.S. at 318.

Focusing on whether Williams' admissions were induced by a promise of leniency, the district court concluded that:

> In the context of this uncounseled interrogation, following a session where police had obtained unwarned admissions and repeatedly suggested that they were only interested in finding out who the actual shooter was, this Court finds that the statement that petitioner would "walk" if he told the truth constituted a promise of leniency sufficient to overcome petitioner's will and render his admissions involuntary. As Justice White indicated in Brady [v. United States, 397 U.S. 742 (1970)], [i]n such circumstances, even a mild promise of leniency [may be] sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady, supra, at 754.

The district court declared that Williams' inculpatory statements on April 10 obtained after the **Miranda** warnings were given violated the dictates of Oregon v. Elstad, 470 U.S. 298 (1985)

because of the coercion. See also Bram v. United States, 168 U.S. 532, 542-43 (1987)(to be admissible, a confession must be "free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.").

The district court also considered the statements under harmless error analysis. United States v Wolf, 879 F.2d 1320, 1323 (6th Cir. 1989) ("Appellate courts, including our own, have applied the harmless error analysis to [otherwise voluntary] confessions admitted in violation of the related rules of **Edwards** and **Miranda**.") The district court found that sufficient evidence to convict independent of the confession did not exist; therefore, admission of the confession was not harmless error.

On October 29, 1990, the district court granted Williams' petition for a writ of habeas corpus and gave Michigan ninety days to "take steps to provide" Williams with a new trial. This appeal followed.

II

This court renders de novo review of a habeas corpus proceeding in the district court to determine whether the petitioner received a fundamentally fair trial. See Lundy v Campbell, 888 F.2d 467-70 (6th Cir. 1989), cert. denied, 110 S. Ct. 2212 (1990). However, this court must give complete deference to the state court's findings of fact, and render clearly erroneous review to the district court's factual findings. Id.

The principal issue in this appeal is whether the record disclosed a fifth

amendment violation sufficient to warrant habeas relief.[1] Withrow argues that there was no violation of Williams' fifth amendment rights because Williams was not in custody until he made an incriminating statement, at which point he was Miranda-ized. This argument is supported by the state trial court and the Michigan Court of Appeals, which both found that Williams "was not in custody until he was read his rights." Williams, 429 N.W.2d at 651. Thus contends Withrow, because the federal habeas statute "requires the federal courts to show a high measure of deference to the factfindings made by the state courts" Sumner v Mata, 45 U.S. 591, 598 (1982)(per curiam), the district

[1] 1. The government's brief argued that the federal grounds for relief were never fairly presented to the state court for review. At oral argument, the government conceded that this position was without merit.

court exceeded its mandate by not explaining in sufficient detail why "the record in the State court proceeding, considered as a whole, does not fairly support such factual determination." 28 U.S.C. §2254(d)(1988).

The district court did recognize its obligation to defer to the state court's factual findings. With respect to the crucial "in custody" determination, however, the district court recognized that "the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an independent federal determination." Even if custody is a factual determination entitled to a presumption of correctness, however, the district court found that "this particular state court finding is so completely devoid of support in the record that the presumption is overcome."

We find that the district court correctly decided that Williams was "in custody" when Sgt Early told him "you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up[.]" (Emphasis added.) Two police officers came to Williams' house, searched him, put him in an unmarked police car, and transported him to the police station. The officers repeatedly conveyed to Williams the seriousness of his situation, and threatened him with arrest. Williams was given the choice of cooperating with the police or going to jail. The district judge, who listened to an audio tape of the interrogation, found the officers' tone to be "severe and accusatory." Clearly, a reasonable person would not feel free to leave; therefore, Williams was in custody. Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("[C]ustodial

interrogation... [is] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").

Williams' inculpatory statements after he was given **Miranda** warnings could be admissible, even though the statements followed on the heels of unwarned statements, if the statements are determined to be uncoerced voluntary. Oregon v. Elstad, 470 U.S. 298, 309 (1985). "'[T]he ultimate issue of 'voluntariness' is a legal question requiring independent federal determination.'" Arizona v Fulminante, 111 S. Ct. 1246, 1252 (1991) (citations omitted). Withrow contends that the district court incorrectly concluded that Williams' statements were involuntary

under Oregon v Elstad because there was no overreaching or coercion by the police. The police merely offered Williams a conditional incentive to tell the truth, and the fact that Williams did not fulfill his part of the bargain by telling the truth should not lead to the suppression of his statement. The police, asserts Withrow, intended to live up to their part of the bargain. Officer Early testified that "I told Mr. Williams that if he was a witness, and he had no active part in the crime, and that could be confirmed by polygraph, that he would not be charged."

The district court relied on "the surrounding circumstances and the entire course of police conduct with resect to the suspect in evaluating the voluntariness of his statements." Elstad, 470 U.S. at 318. We believe that an evaluating of "the entire course of police conduct" in

this case establishes that Williams' statements were not voluntary. His statements were conditioned on his belief that he would be released if he talked. The officers' promises of leniency were intended to induce Williams' admissions.

We recognized that the success of a criminal investigation often hinges on obtaining information from uncooperative individuals. Indeed, many otherwise unobtainable convictions are secured through extending immunity in exchange for a defendant's testimony against more culpable co-defendants. The necessity of foregoing the prosecution of an informant in order to convict the ringleaders is an altogether different situation from the deliberate inducement of inculpatory statements through illusory promises of leniency. Even in situations where immunity is not envisaged, we have no

doubt that effective interrogation techniques require, to some extent, a carrot-and-stick approach to eliciting information from an uncooperative suspect. However, when promises of leniency, coupled with threats of immediate imprisonment, have a coercive effect on a suspect, we are obliged to inquire whether "the 'coercion' in question was sufficient to overbear the will of the accused." McCall v Dutton, 863 F.2d 454, 459 (6th Cir.) cert. denied, 490 U.S. 1020 (1989) (three factors of voluntariness test are (1) objectively coercive police activity which (2) was sufficient to overbear the will of the accused, and (3) petitioner's will was overborne as a result of the coercion). We find that, under the totality of the circumstances of this case, Williams' statements during the April 10 interrogation were coerced in violation of the fifth amendment and should therefore be suppressed.

III

The district court granted the writ of habeas corpus based on its conclusion that the incriminating statements on April 10-12 should be excluded as involuntary. However, the state trial court had already excluded the statements made on April 11 and 12 in September 1985, one month before Williams' bench trial. The trial judge based the exclusion on Michigan law:

> Defendant was lodged in jail, and was questioned twice more in addition to undergoing a polygraph examination before he was arraigned on the afternoon of April 12. Statements obtained during an unnecessary delay in arraignment, where the delay is used as a tool to extract the statements, are not admissible. People v Mallory, 421 Mich 229, 241; 365 NW2d 673 (1985); People v Bladel, 421 Mich. 39, 70; 365 NW2d 56 (1985). No facts have been offered to explain the delay in this case. The Court finds that the delay was for the purpose of extracting inculpatory statements. The statement made by Defendant on April 11 and April 12 were improperly obtained and must be excluded.

The opinion of the district court inexplicably does not mention that the April 11 and 12 statements had already been excluded by the state trial court. Withrow argues that Judge Hackett was "completely unaware" that the April 11 and 12 statements had already been excluded and were never introduced into evidence at the bench trial. Although the statements made on April 11-12 were not admitted against Williams at trial, our conclusion that the inculpatory statements made on April 10 should have been excluded still mandates a new trial. Furthermore, we are convinced that the other evidence against Williams--without the April 10 statements--was insufficient to support a conviction.

The district court considered the applicability of United States v Wolf, 879 F.2d 320 (6th Cir. 1989), which held that "the erroneous admission of an

otherwise voluntary confession obtained in violation of the prophylactic rules of Miranda and its progeny can be harmless. Id. at 1323 (citations omitted). As Wolf was not a habeas corpus case, the district court was not required to address the harmless error issue. Under the U.S. Supreme Court's decision in Arizona v. Fulminate, 111 S. Ct. 1246 (1991), however, harmless error analysis is applicable to the instant case. Fulminante held that the admission of an involuntary confession is subject to harmless error analysis. Id. at 1265.

It is unclear, however, whether Fulminante should be applied retroactively to this case. In general, new rules are only applicable to habeas corpus cases in two narrowly defined instances: (1) if the new rule places an entire category of primary conduct beyond the reach of the criminal law; or (2) new

"watershed" rules of criminal procedure necessary to a criminal proceeding's fundamental fairness. Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990). Before Fulminante, the use of an involuntary confession to support a conviction was a due process violation whether or not evidence apart from the confession existed. It seems clear, then, the Fulminante "alter[s] our understanding of the bedrock procedural elements", 110 S. Ct. at 2831, therefore, harmless error analysis must be applied.

The district court applied harmless error analysis to the involuntary confession, and concluded that:

> There were no lawful confessions admitted in this case. Moreover, the other evidence against petitioner at trial, while substantial, was not massive or overwhelming. No witness was able to identify petitioner as being present at the scene of the murders. Petitioner was linked by testimony to the murder weapon and to the

> victims. If, arguendo, harmless error analysis did apply to the admission of petitioner's inculpatory statements, this court could not find that admission of those statements was "harmless error beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

We are in agreement with the district court that the admission of the April 10 statements was not harmless error.

IV

Finally, Withrow argues that custodial interrogation is not an appropriate issue for collateral review on petition for a writ of habeas corpus. Withrow cites to Stone v. Powell, 428 U.S. 465 (1976), which held that collateral relief in a habeas proceeding was not available for defendants raising fourth amendment search and seizure claims, when those defendants have had a full and fair opportunity to raise those

claims in state court. Both in his brief and during oral argument, counsel for Withrow evinced considerable hostility toward the entire habeas system of review, but provided no support for extending Stone v Powell to fifth amendment claims. Neither the Supreme Court nor any Courts of Appeal has ever indicated a willingness to do so. Moreover, it is extremely unlikely the Supreme Court will do so anytime soon, given its statement in Fulminante that "'the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination.'" 111 S. Ct. at 1252 (citation omitted).

V

The district court's grant of Williams' petition for a writ of habeas corpus is **AFFIRMED.**

APPENDIX B

Case No: 90-2289
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Filed October 3, 1991
Leonard Green, Clerk

ROBERT ALLEN WILLIAMS,

Petitioner-Appellee

v.

PAMELA WITHROW,

Respondent-Appellant.

BEFORE: JONES and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

SIGNED

LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO: 90-2289

Filed 9/11/91
Leonard Green, Clerk

ROBERT ALLEN WILLIAMS, JR.,

Petitioner-Appellee,

v.

PAMELA WITHROW,

Respondent-Appellant.

Before: Jones and Ryan, Circuit Judge;
Peck, Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, CLERK

Issued as Mandate: October 11, 1991

COSTS: None Attest: A True Copy.

SIGNED

DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ALLEN WILLIAMS, JR.,

Petitioner,

PAMELA WITHROW,

Respondent.

Case No: 90-CV-70256-DT
HON BARBARA K. HACKETT

MEMORANDUM OPINION AND ORDER

Petitioner, Robert Allen Williams, Jr., presently confined at the Michigan Reformatory in Ionia, Michigan, has filed this pro se application for writ of habeas corpus pursuant to 28 U.S.C. §2254.

PROCEDURAL HISTORY

On October 29, 1985, following a bench trial, Petitioner was convicted of two counts of first-degree murder, and

two counts of felony firearm. On November 6, 1985, Petitioner was sentenced to two concurrent terms of life imprisonment for first-degree murder, and two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, after an evidentiary hearing, the trial court vacated one felony firearm count and denied Petitioner's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Petitioner's convictions in a published opinion. People v Williams, 171 Mich. App. 234, 429 N.W.2d 649 (1989). Petitioner had raised three issues in his appeal. He claimed that his Fifth Amendment privilege against self-incrimination was violated when the trial court failed to suppress a statement he gave to police prior to receiving his Miranda warnings. He also claimed that his trial counsel

was ineffective for failing to advise him of a possible plea offer and that the trial court had not made adequate findings of fact. On June 9, 1989, the Michigan Supreme Court denied Petitioner leave to appeal. 432 Mich. 911. Petitioner raised only the Miranda and ineffective assistance of counsel issues in his application for leave to appeal.

Petitioner filed this application for writ of habeas corpus on January 31, 1990. In his application, he raises the three issues raised in his appeal to the Michigan Court of Appeals.

The respondent has answered and contends that petitioner has raised no issues justifying relief. Respondent claims that petitioner's Miranda rights were not violated because police need not give Miranda warnings to persons subjected to non-custodial police

interrogation and that petitioner was given Miranda warnings as soon as he was put in custody. Respondent states that petitioner's ineffective assistance of counsel claim is meritless because the record does not support his claim that counsel failed to advise him of a plea offer. Finally, respondent defends that petitioner's claim that the trial court made insufficient findings of fact is barred from habeas review by procedural default because he failed to present this issue to the Michigan Supreme Court in a timely fashion. Furthermore, respondent contends, the issue is solely a matter of State law and not cognizable on habeas review.

Issue One, alleging violation of Petitioner's rights under Miranda and the Fifth Amendment is exhausted. Petitioner has raised this issue in his appeals to both Michigan appellate courts. Having

raised this issue, which is well with in the mainstream of constitutional litigation, and having called upon the Michigan courts to examine the entire record, including tape recordings of his statements to the police, petitioner has exhausted this issue.

Issue Two, alleging ineffective assistance of counsel, is also exhausted, as Petitioner has raised this issue before both the Michigan Court of Appeals and the Michigan Supreme Court.

Issue Three, Petitioner's claim that the trial court made inadequate findings of fact is also exhausted. Petitioner presented this issue to the Michigan Court of Appeals which denied relief on this ground in its opinion of September 7, 1988. Petitioner did not, however, present this issue to the Michigan Supreme Court. See, Application for

Leave to Appeal to the Michigan Supreme Court's 56-day rule, M.C.R. 7.302 (C)(3), Petitioner is now barred by this state procedural default. Respondent has raised the defense of procedural default on this issue. Because Petitioner has procedurally defaulted on this particular claim under Michigan state law, he is barred from raising this particular claim as grounds for habeas relief absent a showing of cause for the default and prejudice resulting from the alleged constitutional violation. Murray v Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). Petitioner has made no such showing. In fact, he has not even alleged any cause for this default, stating incorrectly in his habeas petition that this issue was presented to the Michigan Supreme Court. Consequently, Issue Three, the claimed inadequacy of the trial courts findings

of fact, is barred from habeas review in the present case[1]. Accordingly, this Court will not discuss the merits of this Issue.

FACTUAL BACKGROUND

Van Robin Hooper and Charles David Stanley were shot to death in Hooper's Volvo on a dead end street in Romulus, Michigan. They were shot at close range with a 9mm weapon. An eyewitness, James Scamp, testified that he heard four or five sounds which he first thought were backfires at about 1:10 a.m., April 6, 1985. Scamp was awake in his bedroom at the time. After hearing these noises, he

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1. The rule from Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 1040, 103 L.Ed.2d 308 (1989), that there must be a clear and express finding of procedural default in a state court's judgment before the habeas court will find an issue procedurally defaulted does not apply here. In the present case, the issue in question was not presented to the Michigan Supreme Court at all. Therefore, that court

heard the roaring of a loud car motor which prompted him to go to his window to see if he recognized the car making so much noise. He testified that he saw a back and side view of a person jogging from the passenger side of what later proved to be Hooper's car toward the passenger side of another car. This second car then drove off with its lights off. Scamp stated that it was raining at the time and that he saw this person jogging between the two cars for about three of four seconds from a distance of about ninety feet away. He stated that the person he saw had shoulder length light brown hair, was wearing jeans and a dark colored jacket, and appeared to be

1. (con't) had no reason to address the issue. The rule from Harris only applies when an issue has been presented to the court whose ruling is being analyzed to determine if that court reached the merits of the issue or relied upon a state procedural default.

wearing white shoes from reflections he saw on the wet pavement. Scamp stated he first thought this person was a female because of the hair, body proportions, and jogging stride. Tr. 11, 33-4

Several witnesses testified that Petitioner and Mark Sennett had been seen in the presence of Hooper and Stanley shortly before the killing. There was testimony that Williams drove off in the Torino following Hooper, Stanley, and Sennett in Hooper's Volvo shortly before the killing. Tr. 90. There was also testimony from Gerald Woods that Williams admitted to his that he had followed Sennett, Hooper, and Stanley in another car and that Sennett had shot Hopper and Stankey, gotten in the car Williams was driving and that Williams and Sennett had driven away together and disposed of the murder weapon.

Detective Sgt. David Early of the Romulus Police testified from memory regarding admissions made by Williams during police interrogation. Early related that Williams admitted he had followed in the Torino while Sennett, Hooper, and Stanley drove to dark one-way street in Romulus. Williams also admitted stopping his car behind Hooper's parked Volvo and turning the Torino around when Sennett walked up to the Torino and told him to do so. Williams stated that Sennett also asked him if he (Sennett) should use a gun or a knife shortly before Sennett admitted he had then driven Sennett away from the scene after the shooting and that he helped Sennett dispose of the murder weapon and clothing Sennett had been wearing. Williams denied having shot Hooper or Stanley. Williams also denied knowing that Sennett planned to kill them before he saw the muzzle flashes while he was turning the Torino around. Tr. 161-63.

After a two day bench trial, the court found Williams guilty of two counts of first degree murder. The court "declined to decide whether [he] was the principal or an aider and abettor." People v. Williams, 171 Mich. App. at 238.

I. MIRANDA AND THE FIFTH AMENDMENT

PETITIONER'S SUBSTANTIVE CLAIMS

Petitioner objected to the admission of the statements he gave the police. He received a Walker[2] hearing in which the admissibility of his statements was decided. At the Walker hearing, petitioner's counsel mainly argued that petitioner had been subjected to unwarned custodial interrogation. Counsel argued that petitioner's statements in response to this unwarned interrogation were

2. People v Walker, 374 Mich. 331, 132 N.W.2d 87 (1965).

inadmissible. He also claimed that later statements in response to warned interrogation were tainted by the prior, unwarned statements. Finally, counsel argued that "promises of leniency" rendered petitioner's statements involuntary, citing People v. Conte, 421 Mich. 704, 365 N.E.2d 648 (1984).[3] Suppression Hearing Transcript (SH Tr.) at 36. As previously discussed, a summary of petitioner statements as related by Sgt. Early was admitted at trial. The Michigan Court of Appeals denied relief on this issue, writing: "The court [below] listened to a tape of the conversation between defendant and Early. The court held that defendant was the focus of the police investigation

3. Conte was decided on the basis of the Michigan state constitution. However, it discusses relevant federal precedent particularly U.S. Supreme Court precedent, at length.

until he made statements incriminating himself and was not in custody until he was read his rights. We cannot say that the trial court's findings were clearly erroneous." People v Williams, 171 Mich. App. 234, 238 (1988).

Petitioner was interrogated at three sessions. Two of these sessions took place on April 10, 1985. One of these sessions took place on April 1, 1985. The two April 10, 1985 sessions have not been transcribed. This Court has scrutinized these confessions by listening to three separate audio tapes labeled "Office" (Session one), "Rights in Office" (Session two), and "Video" (Session two). Each of these audio tapes is about one-half hour long. The fourth session was transcribed. It was also

recorded on videotape.[4] This session was abut fifty minutes long.

Peititoner did not receive any Miranda warnings at Session one. Miranda warnings are only required when a person is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.ED.2d 694 (1966). The state trial court found that petitioner was not in custody at this session and the Michigan Court of Appeals found this ruling was not clearly erroneous. This does not resolve the matter, however.

This Court believes that it must make an independent determination of whether or not petitioner was in custody during interrogation session one. In

4. The audiotape labelled "Video" of April 10, 1985, and the videotaped session dated April 12, 1985, which has been transcribed are definitely not the same session.

making this determination, this Court believes that the State court's subsidiary findings of fact a presumption of correctness. 28 U.S.C. §2254(d). For example, a finding that petitioner was not told he was free to go, would be a subsidiary finding of fact. However, this Court believes that the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an independent federal determination. Furthermore, as an analysis of the tape recording of session one will reveal, this Court also believes that if, arguendo, the custody question is a fact question subject to the §2254(d) presumption of correctness, this particular state court finding is so completely devoid of support in the record that the presumption is overcome. 28 U.S.C. §2254(d)(8).

The Supreme Court has established the test for determining custody for Miranda purposes. In Miranda the Court wrote that:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Miranda, Id. at 444.

In Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Court ruled that the test for determining custody is objective. The Court wrote: "... the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer, Id. at 34-5. That is, the relevant inquiry is whether a reasonable man in the suspect's position would believe that he was in custody, i.e. not free to go.

THE FIRST INTERROGATION SESSION

On April 10, 1985, Sgt. Early and Sgt. Ondejko went to petitioner's house to bring him in for questioning. They asked petitioner if he would come with them to the police station and he agreed. He was brought to the police station by these two officers in an unmarked police car. Early testified that petitioner was not arrested at his house.[5] There is no indication that petitioner was ever told he was free to go or that he was not under arrest during the first interrogation session.

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5. At the Walker hearing, Early was impeached with a copy of a police computer printout which stated Williams was arrested at his residence. Early acknowledged the printout reported Williams was arrested at his home, but stated this was incorrect. Hearing Tr. at 14.

After arriving at the Romulus police station, petitioner was taken to a room where he was questioned by early and Ondejko. Petitioner was not accompanied by any friends, relatives, or counsel. The interrogation session began as follows:

Early:	"For starters, you've got big problems."
Williams:	"Big problems. You got people that are gonna testify that put you with this gun.[6] That are gonna testify that you had it, where you had it.
Ondejko:	There's gonna be two life sentences here. This ain't no game.

6. That is, the murder weapon. Romulus police were able to establish through a combination of testimonial and physical evidence that immediately before the murders Williams had possession of the gun which fired the bullets that killed Hooper and Stanley. Williams also admitted this in his statements. He later claimed he had given Sennett the gun shortly before the killings because he wanted Sennett to help him sell it.

Early:	We're about that far tight now from getting a warrant for you. You may not have been the shooter. You supplied the gun and know what happened. We think you were probably there and we think we can prove it.
Williams:	Nope. I wasn't there.
Early:	But the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the shooter on this and we're gonna pretty well be content.

Session One, Audiotape labelled "Office", Counter between approximately 028 and 079.

The tone of these police statements was serious and accusatory. After this exchange, police continued questioning petitioner, asking him if he had been at the scene of the murders, where he had been the night of the murders, and how Sennett had gotten the gun. Petitioner

continued to deny he had bene at the scene of the killings and stated he did not know how Sennett got the gun.

A few minutes later Ondejko asked Early in a low voice, "Did you read him his rights?" Early replied in a hushed, lower voice, "Not yet."

Shortly afterwards Early made the following statement to petitioner:

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove differently. We're not playing. We've been chasing around on this too fuckin' long. ("Office" Audiotape.)

The tone of this statement was again severe and accusatory. This last exchange offered petitioner the choice of answer-ing his interrogators' questions or being formally charged. Furthermore,

the police had indicated to petitioner that he had "big problems," that they were "that far right now from getting a warrant for you." Moreover, petitioner had been told that there were witnesses who would testify of his connection to the murder weapon. He also had been told police believed he had been at the scene when the killings occurred and that they thought they could prove it. Petitioner may have been in custody as soon as he was told these facts. This Court believes he was definitely in custody when he was told that he had a choice between answering his interrogators' questions and being formally charged and locked up. This choice did not leave petitioner free to go. It gave him the choice of surrendering his right to remain silent or being formally arrested. This was a significant deprivation of his freedom of action. A reasonable person

in this position would have believed he was in custody at this time.[7]

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7. In Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the Supreme Court ruled that police interrogation is not necessarily custodial simply because it occurs in the station house. In Mathiason, a parolee was suspected of committing a burglary. Twenty five days after the burglary, the investigating officer left his card at the suspect's apartment together with a note stating he would "'like to discuss something'". Id. at 493. The next day the suspect called the officer on the phone and agreed to come to the station. When the suspect arrived at the state patrol office about two blocks from his home he was told he was not under arrest. He was not given Miranda warnings.

The suspect was told that police believed he had been involved in the burglary and was also told (falsely) that his fingerprints had been found at the scene. A few minutes later, the suspect admitted he had taken the property. The Court ruled that Mathiason had not been in custody at that point.

In a similar case, California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, Title 2d 1275 (1983), the Court reached the same conclusion. Beheler had called the police and "voluntarily agreed to accompany police to the station house, although the police specifically told [him] that he was not under arrest." Id. at 1122. Beheler was questioned for about 30 minutes and allowed to go home. The Court ruled that he was not in custody during this period of questioning.

Petitioner should have been given Miranda warnings at this time. However, he was not. Questioning continued an petitioner admitted that he had given Sennett the murder weapon the night of the killings. Petitioner claimed that he had done this only because he wanted to sell the gun. Petitioner also stated that Sennett had called him after the killings and had told him the gun and the clothes were in the river. Petitioner continued to deny that he had been present at the murder scene. The police continued to suggest that they were

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7. (con't)

This Court believes the present case is distinguishable from Mathiason and Beheler. Petitioner was taken to the station house by police officers upon their initiative, not his. He was never told he was not under arrest. He was told witnesses linked him to the murder weapon and given the choice of answering police questions or being formally charged and locked up. Taken as a whole, these facts show that petitioner was in custody during his first interrogation session.

interested only in finding the shooter. This session ended with the police telling petitioner he was holding something back and lying himself into a corner. Thus, tis Court finds that petitioner made several damaging admissions in response to unwarned, custodial police interrogation.

SUBSEQUENT INTERROGATION SESSIONS

Petitioner was subjected to two additional interrogations, one session recorded on two audiotapes dated April 10, 1985, and another session on April 12, 1985, recorded on videotape and transcribed. At each of these last two sessions, petitioner was given Miranda warnings at the beginning of the session. Each time he was asked if understood his rights and each time he either explicitly answered in the affirmative or continued on his own initiative to discuss matters

with his questioners. He made additional incriminating statements at these subsequent sessions, reiterating and going beyond the admissions he made at the first, unwarned session.

This presents the question of whether petitioner's first, unwarned admissions tainted his subsequent, warned admissions.

In Oregon v Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Supreme Court ruled that:

> [A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the prerequisite Miranda warnings.

Id. at 318

Thus, the fact that petitioner made unwarned inculpatory admissions in the first interrogation session does not necessarily mean his later, warned

admissions are constitutionally defective. That is, the simple fact that these later admissions followed admissions obtained in violation of Miranda does not bar their use. The mere fact that petitioner may have thought the "cat was out of the bag" does not bar use of his subsequent, warned admissions. Id. at 311-13.

However, this Court is required to make the voluntariness inquiry outlined in Elstad before these subsequent warned admissions can be found to meet the requirements of the Constitution. The voluntariness of a confession is determined by an analysis of "... the surrounding circumstances and the entire course of police conduct with respect to the suspect ...." Elstad, Id. at 318. "[T]he Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent

federal determination." Miller v Fenton, 474 U.S. 104, 112 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Therefore, this Court will conduct a de novo review of voluntariness.

Discussing the admissibility of confessions under the Due Process Clause, Justice Frankfurter wrote that:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.
>
> Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1960)

Factors to be considered in making this determination include the duration and conditions of detention, the attitude of the police toward the suspect, the age, mental state, intelligence, and

education of the suspect, as well as the awareness of the suspect of his constitutional rights. Id., See also, Schneckloth v. Bustamonte cite cases where a particular factor stood out while noting that the totality of circumstances must be considered. Elstad also notes that a statement must be voluntary "within the meaning of the Fifth Amendment" to be admissible, Elstad, supra, at 315, and suggests that "threats or promises" made by police are factors to consider in analyzing voluntariness. Id. at 302.

VOLUNTARY ANALYSIS OF PETITIONER'S SUBSEQUENT STATEMENTS

Petitioner was given Miranda warnings at the beginning of the second interrogation session. At the state suppression hearing, Sgt. Early testified that there was no indication petitioner

was under the influence of drugs or alcohol. SH Tr. at 9. There is no testimony on the record as to petitioner's age or education. However, this Court has listened to three audiotapes and viewed one videotape of the interrogation sessions. On the videotape, petitioner appears to have been about 30 years old. While this is only an estimate, it is clear that he was not particularly youthful. He was not a boy, or even a very young man. Furthermore, petitioner testified that he had six prior felony convictions for breaking and entering, and receiving and concealing stolen property. SH Tr. at 21. Sgt. Early testified that petitioner was lucid. This is supported by the four recordings and one transcript of the sessions. The three April 10, 1985, sessions are each about one-half hour long. These factors tend to indicate that any admissions petitioner made were voluntary.

However, there is an additional factor which must be considered in this case. A suspect's will can also be overborne by promises or inducements. In Brady v United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), Justice White, writing for the majority, discussed this issue as follows:

> Bram v. United States, 168 U.S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' 168 U.S. at 542-543. More recently, Malloy v. Hogan, 378 U.S. 1 (1964), carried forward the Bram definition of compulsion in the curse of holding applicable to the States the Fifth Amendment privilege against self-incrimination.

Brady, Id. at 753

Brady, who was advised by competent counsel before entering his plea, had pleaded guilty to a kidnapping charge where the victim had not been released

unharmed. Brady claimed that his plea was involuntary because the pertinent statute provided that maximum penalty after a guilty plea was life imprisonment, while a guilty verdict after jury trial could result in a death sentence. Brady claimed that under Bram this amounted to an improper promise of leniency which rendered his guilty plea involuntary. Justice White explained why Bram did not control Brady's case:

> Bram is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But Bram and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more that Miranda v Arizona,

> held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.

Brady, at 754 (citations and footnotes omitted, emphasis added)

In the present case, Sgt. Early was asked at the suppression hearing if any promises had been made to petitioner. He answered as follows:

> The only promise or statement of that type given Mr. Williams was that if he was only a witness with no involvement, he most likely would not be charged in the case, but then subsequently [it] came to the point where he was definitely more than a witness, and also polygraph examination was involved. We stated that he would have to pass polygraph examination and [he] did not.

SH Tr. at 8-9.

Petitioner was given Miranda warnings at the beginning of the second interrogation session. After Miranda warnings were given, the following exchange took place:

Early:	Do you understand your rights that I've explained to you?

Williams:	What does this mean?
Early:	You're being charged with murder in the first.
Williams:	Why?
Ondejko:	Because you won't level with us.
Early:	Do you understand your rights?
Williams:	Yeah. (nearly inaudible after a long pause).
Early:	Do you wish to make any further statements at this time?
Ondejko:	Do you wish to change your story? (softly)
Williams:	What difference is it going to make?
Ondejko:	It's gonna make a lot of difference to you.
Early:	I told you. If you told the truth (Stops abruptly when interrupted by Williams).
Williams:	(interrupting Early) I've been telling you the truth.
Early:	Oh, you've been making up fairy tales ever since you've been in here. You're giving us, like he says, parts of the truth, parts of what you want us to

believe, and part of what really happened. (angrily).

Williams: If I tell you everything that happened, I'm gonna walk outta here, huh?

Ondejko: Someday you may stand a chance of walking.

Early: I'll make you a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk.

Audiotape labelled "Rights in Office", Counter reading between 090-120.

Early then explained that a polygraph test would have to be given the next day. He then told petitioner, "Tomorrow you can walk out of here if you're telling me the truth." Id.

Shortly after this discussion, petitioner changed his story, making several additional damaging admissions. In his first unwarned statement, petitioner had denied being present at

the scene of the killings. In his second statement, he admitted driving the Torino and following Sennett, Hooper, and Stanley, who were in Hooper's Volvo. He admitted following them to scene of murders and turning the car around at Sennett's request. He stated he heard several shots and saw muzzle flashes. He admitted driving Sennett away at Sennett's request and throwing the murder weapon in the river. Petitioner also admitted helping dispose of clothing Sennett had been wearing. He denied having any knowledge Sennett was going to kill Hooper and Stanley before he saw the muzzle flashes. He also denied having shot the victims.

The critical question in this case is whether petitioner's admissions in this second interrogation session were induced by a police promise of leniency. It should be noted that a repeated theme

in the first, unwarned session was that the police were basically interested in getting the shooter. After promising petitioner that he would "walk" if he told them the truth, petitioner was encouraged to "open up and lock him [Sennett] up, that's all." Audiotape, "Rights in Office" at counter 167-8.

In the context of this uncounseled interrogation, following a session where police had obtained unwarned admissions and repeatedly suggested that they were only interested in finding out who the actual shooter was, this Court finds that the statement that petitioner would "walk" if he told the truth constituted a promise of leniency sufficient to overcome petitioner's will and render his admissions involuntary. As Justice White indicated in Brady, "[i]n such circumstances, even a mild promise of leniency [may be] sufficient to bar the con-

fession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady, supra, at 754.

It may be asserted that Early's promise that petitioner would "walk" did not constitute a promise of leniency, that it is too ambiguous to be so considered. This Court does not believe this to be the case, even on the basis of the "Right in Office" tape alone. However, this Court need not rely on its interpretation of this tape alone. In a third tape, labeled "Video"8

8. No additional Miranda warnings were given at the beginning of this third tape. The tape is dated April 10, 1985. No time of day is indicated. This interrogation clearly follows the interrogation recorded on the "Rights in Office" tape because it refers to statements made on that tape. Although it has been given

after noting that petitioner had been read his rights and that he still made a statement, Sgt. Early elaborated on the promise that had been made to petitioner as follows:

Early: You're worried now about us turning this around on you and charging you too. We've said that basically we ant you as a witness. Right?

Williams: Yes

Early: Alright, I'm gonna tell you right now, at the start of the recording, if we use this recording against you, it's got to be in its entirety. We can't edit it or cut it. We told you if you are a witness to this and if you are telling the truth, and if you are willing to testify, then we are not going to charge you as a

8. (con't) a different title and is on a separate tape, it should probably be considered a continuation of the same interrogation session recorded on the "Rights in Office" tape. (Although the tape is labelled "Video", it does not follow interrogation session recorded on videotape. The videotaped session is dated April 12, 1985).

co-defendant. That's what we told you, right?

Williams: Yes.

Early: Alright. We're still gonna go by that agreement. And I don't. [abrupt stop]. You've been around, but if, whether you're up on the law, if a police officer makes an agrement like that it's got to be honored. You can go to court and say we made that agreement and we backed down on it and we can't present these tapes and use anything else we've got. So it's an agreement we have to stick to by law. I can't promise you anything and then turn around and back out of it and use it against you.

Williams: O.K.

Early: Right now you're a witness to the crime. But we ant the truth. If you start lying to us and you start playing games, yeah, we're gonna charge you. A witness doesn't do us any good unless he tells the truth. We're not trying to hang anybody with this, we're still gonna put

> you on a polygraph and you're gonna have to show us you're telling the truth and you're not being charged. That fair enough?

Williams: Yeah.

Audiotape labelled "Video" at 028-068.

The federal courts have not interpreted Bram liberally. Bram does not preclude counseled guilty pleas, although these often involve at least implied promises of leniency or pleas to less than maximum possible charges. Brady, supra, at 752-53. "An interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation will have a positive effect". U.S. v. Leon Guerreri, 847 F.2d 1363, 1366 (9th Cir, 1988). Mere exhortations to tell the truth do not render a confession

involuntary. Crooker v. California, 357 U.S. 433, 437 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958). Nor does a promise that a statement will not be used by one sovereign render its use by another sovereign involuntary. U.S. v. Long, 852 F.2d 975 (7th Cir. 1988).

In Long, the court noted that the often repeated quote from Bram that a confession is involuntary if it is "obtained by any direct or implied promises, however slight, [[or] by the exertion of any improper influence", Bram, 168 U.S. at 542-43, had not been applied to establish a per se rule. The court noted what it considered to be a more accurate statement of the rule as follows:

> ...where the other circumstances surrounding the confession do not suggest that the defendant's will was overborne...improper of misleading inducements make a

> confession involuntary. For example, leading the defendant to believe that he or she will receive lenient treatment when this is quite unlikely is improper, whereas making a promise to bring the defendant's cooperation to the attention of the prosecutor or to seek leniency, without more, is not. (Citations omitted).

Long, 852 F.2d at 978.

In the present cas, the police went far beyond mere exhortations to tell the truth. They simply did not state that they would inform the prosecutor of any cooperation by petitioner and recommend leniency accordingly. Rather, after indicating several times that they were basically interested in knowing who the shooter was, the police promised petitioner that if he told them the truth about the crime he would not be charged. They made this promise to petitioner after acknowledging that they had witnesses who linked him to the murder weapon and stating they believed they could prove he was at the murder scene.

It was indeed, "quite unlikely" that petitioner would "walk" and not be charged at this time. Furthermore, this promise was made after having obtained unwarned admissions, thereby "exploit[ing] the unwarned admission to pressure [petitioner] into waiving his right to remain silent". Elstad, supra, at 315. This Court finds that the promise made to petitioner in the interrogation recorded in the "Rights in Office" and "Video" audiotapes, that if he told the truth he would not be charged was improper, misleading, and induced the inculpatory statements he made after receiving Miranda warnings. Consequently, this Court finds these statements to be involuntary under the inquiry mandated by Elstad. These statements should not have been admitted at petitioners trial.9

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9. The fact that the police conditioned their promise of leniency upon verification by polygraph and that petitioner failed the polygraph test does not render his statements

Petitioner was interrogated again on April 12, 1985. This session was recorded on videotape and transcribed in writing. Petitioner was given Miranda warnings at the beginning of this session. In this session, petitioner was told that because he had not passed a polygraph exam given on April 11, 1985, he could be prosecuted. He was told that the question of his prosecution was "far from open and shut". Interrogation Transcript (Int. Tr.) at 1. After being told he had not passed the polygraph exam he was encouraged to submit to further questioning to see if "[m]aybe we can clear that up". (Int. Tr) at 2.

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9. (con't) voluntary. The promise of leniency had already had its intended effect and prompted petitioner's inculpatory statements before the polygraph test was given. The fact that the promise he would not be charged if he told the truth induced petitioner to both make inculpatory statements and to submit to a polygraph exam hardly renders the promise less coercive.

In this session, petitioner essentially repeated the admissions and denials he had made in previous sessions. This session is another warned interrogation subsequent to the initial, unwarned session. However, the admissions made in this session cannot be found to be constitutional under the Elstad doctrine, because the admissions made in this session also follow the involuntary admissions made in the "Rights in Office" and "Video" session. This April 12, 1985, session did not simply follow an unwarned, but voluntary inculpatory statement. Rather, it followed a warned, but involuntary inculpatory statement, induced by an improper promise of leniency.

Confessions subsequent to an involuntary confession are not per se inadmissible. However, there must be a "break in the stream of events... sufficient to insulate" the subsequent

confession from the coercive effect of the prior involuntary confession. Darwin v. Connecticut, 391 U.S. 346, 349, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968). There is no indication that this occurred in the present case.

The admissions made by petitioner in this last, warned interrogation session were attempts on his part to "clear up" areas where he had failed the April 11, 1985, polygraph test. His uncounseled submission to this polygraph test was itself induced by the same improper promise of leniency which prompted his admissions after receiving Miranda warnings. Thus, this last interrogation session was, in fact, a part of the "stream of events" begun by the promise of leniency made to petitioner. Consequently, petitioner's inculpatory statements made at the April 12, 1985,

interrogation are not admissible under Darwin. See also Clewis v. Texas, 386 U.S. 707, 710 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967), (stating that to be admissible, a confession made following an involuntary confession must be "insulate[d]...from the effect of all that went before.").

A panel of the Sixth Circuit has recently written that it believed Supreme Court precedent allowed application of harmless error analysis to erroneous admission of an otherwise voluntary confession obtained in violation of Miranda and its progeny, but not to a coerced confession. U.S. v. Wolf, 879 F.2d 1320, 1323-24 (6th Cir. 1989). This Court agrees. Consequently, this Court believes that because petitioner's inculpatory statements were involuntary under Bram, Brady, and the Fifth Amendment, admission of these statements could not be harmless error.

Furthermore, even where harmless error analysis applies to an unlawfully obtained confession, "'the admission of an unlawful confession [is] harmless only in limited instances, such as where there was in evidence one other lawful confession by the defendant.'" Wolf Id. at 1324, quoting Christopher v. Florida, 824 F.2d 836, 846 (11th Cir. 1987). There were no lawful confessions admitted in this case. Moreover, the other evidence against petitioner at trial, while substantial, was not massive or overwhelming. No witness was able to identify petitioner as being present at the scene of the murders. Petitioner was linked by testimony to the murder weapon and to the victims. If, arguendo, harmless error analysis did apply to the admission of petitioner's inculpatory statements, this Court could not find that admission of those statements was

"harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner has alleged that his trial counsel failed to inform him of a plea offer made by the prosecutor. He claims that this alleged failure deprived him of the effective assistance of counsel. The right to effective assistance of counsel extends to decisions of whether or not to accept plea offers. Turner v. State of Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988). Failure to communicate a plea offer can constitute ineffective assistance of counsel. Williams v. Arn, 654 F.Supp. 226, 237 (N.D. Ohio 1986). Hence, this claim is cognizable in habeas corpus. The overall issue of the effectiveness of counsel is a mixed

question of law and fact. Therefore, state court findings on the ultimate issue are not entitled to a presumption of correctness. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Michigan Supreme Court ordered the trial court to make findings of fact on this issue. The trial court held an evidentiary hearing on August 26, 1986, to determine whether the prosecutor did indeed make a plea offer to petitioner and whether trial counsel communicated any such offer to petitioner. Testimony was taken from petitioner, trial counsel Martin Marcus, appellate counsel Suzanne Schuelke, and the assistant prosecutor at trial, Robert Agacinski. The hearing transcript is eighty-seven pages long.

The trial court judge made detailed findings of fact after this hearing. These findings are summarized as follows:

> ...it was undisputed some unknown prosecutor, at some unsure place, offered to recommend that defendant receive a 20-year minimum, and it was clear that the defendant did turn this down as he himself testified to. It is subsequent to this time that the Supreme Court apparently wants this Court to make findings of fact as to the content of the conversations between defendant's trial attorney and the assistant prosecutor who actually tried the case. Testimony was taken by this Court in this regard and there was some dispute as to the content of the conversations. This Court did indicate that defendant's counsel, Mr. Marcus, gave highly suspect testimony because of the fact that he was impeached, was not sure and changed his mind, at various times, while the testimony of assistant prosecutor who tried the case was clear and direct. It is clear, from all the testimony of the convulsants, that there never was a clear offer to defendant's counsel that there would be a sentence recommendation of a 15-year minimum term. It is obvious to this Court that it was just talk and if the defendant had indicated a willingness to plead guilty with a sentence recommendation of a 15-year minimum term, that the assistant prosecutor would take it to his superior. Specifically, in regard

> to the conversations between the defense counsel and the assistant prosecutor, it is clear from the testimony that was taken before this Court there never was an offer of a 15 year minimum term. It was all merely conversation.
>
> Findings of Fact on Remand from the Michigan Supreme Court at 1-2 (emphasis added).

The trial court also found that "[whether defendant's counsel accurately reported the contents of these 'off-the-cuff' conversations will never be absolutely certain inasmuch as the attorney has indicated that he just doesn't remember although he knows there were some conversations]". Id. at 3. Thus, the trial court did not make an explicit finding as to whether counsel informed petitioner of these plea "conversations" which it did not consider a plea offer.

Thus, the trial court found that no plea offer was made. This finding is supported in the record and is entitled

to a presumption of correctness. 28 U.S.C. 2254(d). Ordinarily, such a finding would be dispositive of this issue, for if no plea offer has been made, failure to communicate preliminary discussion or "conversations" is not ineffective assistance of counsel. Williams v. Arn, supra, at 242.

This would apparently overrule the trial court's finding that no offer had been made. However, the court went on to state further:

> Because the offer was conditional, we believe that defendant could demonstrate that an offer was made by proving by a preponderance of the evidence that he would have accepted a fifteen-year sentence and that [prosecutor] Kenny would have approved the same....We find defendant's proof concerning Kenny's approval on the offer lacking. Marcus conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most, Marcus testified that he hoped that Agacinski could convince Kenny to go lower.
>
> Id.

Thus, the Michigan Court of Appeals wrote that a conditional offer was made, that one condition of the offer was prosecutor Kenny's approval, and that petitioner failed to prove the existence of that condition. While this seems to be inherently contradictory, resolving this contradiction is not essential, for petitioner must not only prove that a plea offer was made, he must also prove that counsel was incompetent, i.e., that counsel did not communicate this plea to petitioner, and that this incompetence prejudiced petitioner. To establish the required prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

This Court finds that both the trial court and the Michigan Court of Appeals agreed that petitioner failed to prove that Kenny, or any other prosecutor, would have approved a plea bargain for petitioner other than the twenty-year minimum sentence which he rejected. The Court of Appeals specifically wrote that Marcus, petitioner's trial counsel "conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most [Marcus] testified that he hoped that Agacinski could convince Kenny to go lower." People v. Williams, supra, at 242. Therefore, this Court finds that petitioner cannot satisfy the prejudice prong of Strickland. Even if, arguendo, a conditional plea offer was made and further assuming, arguendo, that Marcus failed to inform petitioner of this, satisfying the incompetence prong, petitioner cannot show that this incompetence prejudiced him.

In the particular circumstances of this case, petitioner would have to show some reasonable probability that Kenny would have approved a plea bargain of less than twenty years to undermine this Court's confidence in the result of the proceeding. Yet, the Michigan courts have already found as a factual matter that petitioner failed to do this. These findings are supported in the record and are entitled to a presumption of corrcteness. 28 U.S.C. §2254(d). Petitioner is not entitled to relief on this issue.

CONCLUSION

This Court has found that inculpatory statements induced by improper promises of leniency were admitted at petitioner's trial. These statements were involuntary under the Fifth Amendment and U.S. Supreme Court

precedent. This Court has further found that admission of these statements was not harmless error. This Court feels an "inevitable and understandable reluctance to exclude an otherwise reliable admission of guilt." Miller v. Fenton, supra, at 117. However, this Court is also aware that it is "...not called upon in this proceeding to pass on the guilt or innocence of the petitioner of the atrocious crime that was committed." Davis v. North Carolina, 384 U.S. 737, 739, 86 S.Ct. 439, 15 L.Ed.2d 358 (1966). Furthermore, the issue of the voluntariness of a confession must be addressed "with complete disregard of whether or not petitioner in fact spoke the truth." Rogers v. Richmond, 365 U.S. 534, 544, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). The Constitution requires that no person be convicted on the basis of a confession which is the product of improper threats or promises or coercive conditions. Accordingly,

IT IS ORDERED that the petition for writ of have as corpus is conditionally GRANTED. Unless the State takes steps to provide petitioner with a new trial within 90 days of the date of this Order, or, should it be appealed, within 90 days of the date of affirmance on appeal, should that be the result, a writ of habeas corpus unconditionally discharging petitioner from custody on the basis of the sentence imposed in this case will be issued.

BARBARA K. HACKETT

UNITED STATES DISTRICT

JUDGE

Dated:

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs,

vs 85-567271

ROBERT ALLEN WILLIAMS,

Defendant.

OPINION OF THE COURT

Defendant ROBERT ALLEN WILLIAMS moved to suppress statements made by him on April 10, April 11, and April 12, 1985. An evidentiary hearing was held September 3, 1985. Defendant's motion is grant as to statements made April 11 and April 12, denied as to the statements made April 10, 1985.

Romulus police officers investigating two apparent murders had heard that Defendant might have

information about the decedents. They were admitted to Defendant's home by his mother on April 10. He was searched but was not handcuffed, and asked to come to the police station for questioning. He was not placed under arrest, but agreed to come with them and to answer questions. After approximately 40 minutes of questioning at the police station, Defendant began to implicate himself. Questioning stopped, and Defendant was given his Miranda warnings. He waived his rights and the questioning continued. He was questioned a second time on April 10, after Miranda warnings and his waiver of rights. Defendant was then lodged in jail. He was given a polygraph examination and questioned a second time on April 11. He was questioned again on the morning of April 12, and was arraigned that afternoon.

Miranda warnings are not required before questioning unless a defendant is in custody, or is the focus of the investigation. People v Blackburn, 135 Mich App 509, 517; 354 NW2d 807 (1984). To determine whether a defendant was in custody, the occur must consider the totality of the circumstances. People v Blackburn, 135 Mich App at 517-518. Here the defendant agreed to go to the police station for questioning. He was not handcuffed. Detective Sergeant Early testified that hew as not under arrest, but was free to come and go; Defendant testified that he believed he was under arrest. When Defendant began to implicate himself, questioning was stopped. He was then given Miranda warnings, and questioning continue! After he waived his rights. The Court after hearing testimony of the police officer involved and of Defendant, and after hearing the taped interview, finds that

questioning prior to the warnings was not custodial interrogation because defendant was free to leave at any time. Defendant was not the focus of the investigation until he began to implicate himself. At that point questioning stopped and he was advised of his rights and waived them. The statements made on April 10 were not improperly obtained, and are admissible.

However, following questioning on April 10, 1985 there was not sufficient probable cause to arrest Defendant. Nevertheless Defendant was lodged in jail, and was questioned twice more in addition to undergoing a polygraph examination before he was arraigned on the afternoon of April 12. Statements obtained during an unnecessary delay in arraignment, where the delay is used as a tool to extract the statements, are not

admissible. People v Mallory, 421 Mich 229, 241; 365 NW2d 673 (1985); People v Bladel, 421 Mich 39, 70; 365 NW2d 56 (1985). No facts have been offered to explain the delay in this case. The Court finds that the delay was for the purpose of extracting inculpatory statements. The statements made by Defendant on April 11 and April 12 were improperly obtained and must be excluded.

Defendant's motion is granted as to the statements made on April 11 and April 12, denied as to the statements made on April 10. An order consistent with this opinion may be presented in accordance with MCR 1985, 2.602.

SIGNED

JOSEPH B. SULLIVAN

Wayne Circuit Judge

Dated at Detroit, Michigan

September 27, 1985

APPENDIX F

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs SEPTEMBER 7, 1988
No: 97724

ROBERT ALLEN WILLIAMS,

Defendant-Appellant.

Before: H. Hood, P.J. and J.H. Gillis and M.B. Breighner, *JJ.

J.H. GILLIS, J.

Following a bench trial, defendant was convicted of two counts of first-degree murder, MCL 750.316: MSA 28.548, and felony firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent mandatory life sentences for the murders to be served consecutively with his mandatory tow-year prison sentence for felony firearm. Defendant moved for a new trial, claiming that one

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* Retired circuit judge, sitting on the Court of Appeals by assignment.

of the two felony firearm convictions which appeared on his judgment of sentence should be struck, that the trial court did not make specific findings of fact and that defense counsel was ineffective because he failed convey a plea bargain offer to defendant. The trial court granted defendant's motion to strike one felony firearm conviction, but otherwise denied defendant's motion. Defendant appeals as of right. We affirm.

In this case, Van Robin Hooper and Charles David Stanley were killed Hooper's Volvo. Hooper, seated in the driver's seat, was shot four times in the head (i.e., once in the ear, chin, forehead and right side of the head) and once in the neck. All the shots travelled from right to left. Two of the shots were close range (i.e., less than eighteen inches), Stanley, seated in the passenger

seat behinds Hooper, was hot eight times, four times in the head (once in the ear, chin, temple and eye) and once in each hand, his chest and back. One shot was at close range and two of the wounds may have been reentry wounds. The shots again travelled from right to left. Twelve nine-millimeter casings were found at the scene.

James Scamp, who lived on the road where the bodies were discovered, testified that at approximately 1:10 a.m. on April 6, 1985, he heard four or five back-firing sounds. He then heard a roaring car, gunning its engine. Hooper's Volvo had its rear flashers on, but the other car on the street did not have its lights on. The street was a dead end street and Hooper's Volvo was facings in the direction of the dead end. Scamp saw that the other car was an older dark-colored two-door Grand Torino with a

scoop hood. Scamp observed a person slowly jogging from the passenger side of the Volvo to the passenger side of the Grand Torino. The person had shoulder-length light brown hair and was wearing a thin dark-colored jacket and blue jeans. Scamp believed the person was female because of the hair, the way the body was proportioned and the jog. Because Scamp saw a white reflection on the wet pavement, he believed that the person was wearing whit-bottomed oxfords or tennis shoes. That person got in the passenger side of the Torino and the Torino drove off without its lights on. Once the Torino reached the main street, its lights came on. The bodies were discovered the next day and, when the police came to Scamp's door, he told them what he had seen.

Defendant first claims that the trial court erred when it failed to

suppress an April 10, 1985 statement he gave to the police. Defendant claims that, because he was the focus of the police investigation or was in custody when he gave the statement, he was entitled to be informed of his Miranda [v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] rights. Recently, our Supreme Court rejected the focus test and adopted the custody test. People v Hill, 429 Mich 382; 415 NW2d 193 (1987). To determine whether the defendant was in custody at the time of the interrogation, the totality of circumstances must be examined. People v Marbury, 151 Mich App 159, 162; 390 NW2d 659 (1986). The key question is whether the defendant could have reasonably believed that he was not free to leave. Hill, supra 399; Marbury, supra, 162. The trial court's decision regarding the admissibility of a statement will not be reversed unless it is clearly erroneous. Id. We note that his

Court defers to the trial court's superior ability to assess the credibility of the witnesses. People v Williams, 163 Mich App 744, 749-750; 415 NW2d 301 (1987).

Detective Sergeant David Early testified that he went to defendant's house because other people he had questioned told him that defendant might have information about the crime. Defendant was sleeping and his mother woke him. When defendant was probably searched before entering Early's unmarked police car. Defendant was not handcuffed. After questioning defendant, it became clear to Early that defendant may have been involved in the crime. Defendant was arrested and informed of his Miranda rights. Defendant waived his rights and continued with his statement. Early was impeached with a computer form which indicated that defendant was arrested at his residence.

Defendant agreed that he accompanied Early and his partner to the police station. Defendant testified that Early told him that he would not be charged because he was just a witness. Defendant believed that he was under arrest when he left his house. Defendant claimed that Early told him that he was under arrest when he left his house.

The court listened to a tape of the conversation between defendant and Early. The court held that defendant was not the focus of the police investigation until he made statements incriminating himself and was not in custody until he was read his rights. We Cannot say that the trial court's findings were clearly erroneous. See and compare Marbury, supra.

Defendant also claims that the trial court's findings of fact were insufficient because it declined to

decide whether defendant was the principal or an aider and abettor. MCR 2.517(A). While the prosecutor argued that defendant was either the principal (i.e., the shooter) or an aider and abettor (i.e., provided the gun and drove the getaway car with knowledge that Mark Sennett intended to kill the victims), defendant claimed that he was merely present when the shootings occurred and did not know that Sennett intended to kill the victims. Because this was a contested matter, the trial court should have decided whether defendant was the principal or aider and abettor. MCR 2.517(A)(2). However, in light of the fact that the Legislature abolished the distinction between aiders and abettors and principals, MCL 767.39; MSA 28.979, we believe that any such error is harmless.

Defendant argues that the error is not harmless because it may affect his chances for a commuted sentence. Defendant relies on People v Norman, 148 Mich App 273; 384 NW2d 147 (1986). We believe that Norman is distingush- able and, therefore, decline to remand for further fact-finding.

Further, defendant claims that the trial court erred when it denied his request for a new trial given that defense counsel failed to convey a plea bargain offer to him. In an affidavit defense counsel Martin Marcus stated that, at the beginning of trial, the prosecutor offered defendant a plea to second-degree murder with a fifteen- year prison sentence. Marcus stated that he did not relay the offer to defendant because he believed that defendant stood a good chance of acquittal.

At a hearing on the motion for a new trial, defendant testified that one month before trial, he received an offer to plead to second degree murder in exchange for a twenty-year sentence. Upon Marcus' advise, defendant declined the offer. Defendant indicated that the told Marcus in the first week he met him that he would accept a plea if the sentence was low enough. Later in his testimony defendant claimed that five, ten or fifteen years would be low enough. At defendant's sentencing, Marcus mentioned a plea bargain, but defendant did not know the details. Defendant at first testified that Marcus may have talked to him in the lock up during trial; however, on rebuttal, defendant testified that Marcus did not see him in the lockup. Defendant stated that he would have plead guilty to second-degree murder in exchange for a fifteen year sentence.

Marcus testified that defendant declined to take the first offer. Marcus then testified that on the second day of the trial there was a break in the proceedings. Marcus walked over to the prosecutor's table where Mr. Agacinski, the prosecutor, and Early were sitting. Somehow, the discussion concerning a plea came up and Agacinski indicated that a plea to second-degree murder in exchange for a fifteen-year sentence might be possible; however, Agacinski indicated that prosecutor Kenny, his superior, would have to approve such a plea. Then, the judge cam back into the courtroom. Marcus could not recall if he had mentioned the offer to defendant, although he conceded that there was sufficient time to do so. Marcus stated that he believed that he had conveyed the offer to defendant, but became unsure when defendant acted surprised when he mentioned the offer at sentencing.

Following the first plea offer, Marcus conceded that he had gone to Kenny to see if he could get a better for defendant. Kenney refused to lower the original offer, noting that a heinous double homicide was involved. Marcus further conceded that at the time he signed his affidavit that he forgot that the offer was made subject to Kenny's approval. He recalled that the offer was conditional after a later conversation with Agacinski. Marcus indicated that he did not recall talking to defendant in lockup and it was not his procedure to do so.

Suzanne Schuelke, appellate counsel for defendant, called for impeachment purposes, testified that she called Marcus in November, 1985. At the time, Marcus told Schuelke that "in the haste and confusion of coming back out and

calling Mr. Williams down, he just plain forgot" to tell defendant about the plea offer.

Agacinski testified that on the first day of trial, the proceedings did not begin at 9 a.m. Marcus approached Agacinski and asked if anything could be done regarding a plea. Agacinski told Marcus that he did not have the authority to enter into a plea, but would have to check with Kenny. Agacinski told Marcus the best he could get was a fifteen-year sentence for the murders plus two years for the felony firearm. Agacinski told Marcus that he did not want to talk to Kenny unless defendant was willing to accept such a plea. Marcus left the courtroom and was gone for about ten to fifteen minutes. Marcus returned and told Agacinski that "his man said the numbers were too high." Defendant was brought down from lockup a few minutes later.

The trial court found Marcus' testimony highly suspect, but, in any event, held that there was "never really an offer."

Although the issue has never been decided in Michigan, we agree with the many courts which have held that an attorney's failure to advise his client of a plea bargain offer may be ineffective assistance of counsel. Williams v Arn, 654 F Supp 226 (ND Ohio 1986), vacated but reinstated, 654 F Supp 241 (ND Ohio 1987), appeal dismissed, 820 F2d 1226 (1987); People v Alexander, 136 Misc 2d 573; 518 NYS2d 872 (1987); Ex Parte Wilson, 724 SW2d 72 (Tex Crim App 1987); Hanzelka v State, 682 SW2d 385 (Tex App 1984); Young v State, 470 NE2d 70 (Ind 1984); State v Simmons, 309 SE2d 493 (NC App 1983); Lyles v State, 382 NE2d 991 (Ind App 1978). We further agree that defendant has the burden of

proving by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate it to him. Alexander, supra; State v Martin, 318 NC 648; 350 SE2d 63 (1986); Young, supra.

In this case, we believe that a conditional offer was made. Because the offer was conditional, we believe that defendant could demonstrate that an offer was made by proving by a preponderance of the evidence that he would have accepted a fifteen-year sentence and that Kenny would have approved the same. Compare Arn, supra, where a conditional offer such as the one in this case was conveyed as an unconditional offer, but was revoked before trial; Simmons, supra where defense counsel failed to convey an unconditional offer because he believed it was conditional and the condition did not occur; Harris v State, 437 NE2d 44 Ind 1982), where one prosecutor stated

that given the circumstances, it would be appropriate if the defendant could plead guilty to voluntary manslaughter and another prosecutor, without authority to enter an binding plea bargain, asked one co-counsel to check with the other about the possibility of a plea. We find defendant's proof concerning Kenney's approval of the offer lacking. Marcus conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most, Marcus testified that he hoped that Agacinski could convince Kenney to go lower. As such, we affirm the trial court's opinion as reaching the right result albeit for the wrong reason.

Affirmed.

/s/Joh H. Gillis

/s/Martin M. Breighner

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

No: 97724

ROBERT ALLEN WILLIAMS,

Defendant-Appellant.

Before: Hood, P.J. and Gillis and M.B. Breighner, *JJ.

HAROLD HOOD, P.J. Dissenting

I respectfully dissent. I would reverse and remand for a new trial on defendant's second issue, in which defendant claims his counsel did not inform him of a plea offer made by the prosecutor.

The court ordered an evidentiary hearing to determine whether the prosecutor had made an offer to plea

* Circuit judge, sitting on the Court of Appeals by assignment.

which was not communicated to defendant. At this hearing, defendant testified that some time after trial, defense counsel told him about a plead offer of second degree murder with a sentence of 15 years imprisonment, which had been made before trial. Defendant testified that defense counsel did not inform him of this offer until after trial. Defendant testified that he had told defense counsel early in his prosecution that he would be willing to plea to a five, ten or fifteen year sentence.

Defense counsel testified that on the second day of trial, during a break while the judge was out of the courtroom, the prosecutor mentioned to him that defendant could plead guilty to second degree murder, for fifteen years imprisonment. When he got back to the defense table, however, the judge entered the courtroom, they were told to rise,

and trial proceeded. At first, he did not know whether or not he told defendant about the offer, but later, defendant told him that he had not told defendant. And, he remembered that at sentencing, he told defendant that "maybe [the] 2nd degree offer that hey made during the trial with the 15-year minimum sentence wasn't such a bad idea." Defendant seemed surprised, further indicating to him that he had not previously told defendant.

Suzanne Schuelke, defendant's appellate attorney, testified that shortly after she took over the file from defense counsel, she called defense counsel and he told her that there had been a plea bargain offer made that he had not communicated to defendant, and that he felt guilty about it and thought she should know about it for appeal purposes. He told her that he "just plain forgot."

The prosecutor testified that on the first day of trial, defense counsel approached him and asked him if anything could be done as far as getting a plea. He said he had no authority to allow a plea, and that he would have to talk to his superior at the prosecutor's office. He told defense counsel to ask defendant if he was "willing to take a plea within those large numbers." He testified that defense counsel left the courtroom to talk to defendant, and returned ten or fifteen minutes later and said "the numbers were too high." The prosecutor testified that therefore, "[he] never talked to [his superior] and we never offered a plea."

Defendant testified in rebuttal that defense counsel did not come up to the lockup and tell him about the plea.

The court held that there was no actual offer of a plea. The court felt that it was "just talk, subject to approval of some higherup in the prosecuting attorney's [sic] officer." Thus, the court denied the motion.

We feel that the court erred in finding no offer of a plea. As the court properly noted, an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle. Joos v Auto-Owners Ins. Co, 94 Mich App 419, 424; 228 NW2d 443 (1979), lv den 408 Mich 946 (1980). When the prosecutor told defense counsel to ask defendant whether he would be willing to plead guilty in exchange for a fifteen year sentence, and offer was made about which defendant was entitled to know. Although there are no cases on point in Michigan, other jurisdictions have held that a defendant is entitled to a new trial where defense counsel failed

to communicate a plea bargain to him. See Lyles v State, 178 Ind App 398; 382 NE2d 991 (1978); State v Simmons, 65 NC App 294; 309 SE2d 493 (1983); Zelka v State, 682 SW2d 385 (Tex App, 1984). I feel that this rule is a sound one, and should be adopted in Michigan. This rule is consistent with the principle that it is the defendant's right to choose whether or not to plead guilty. See Boykin v Alabama, 395 2d 314 (1966). Defendant was entitled to hear the plea offer and decide whether he would accept it. Defendant was prejudiced by defense counsel's failure to communicate to him the plea offer.

I do not feel that the fact that the plea had to be approved by the prosecutor's superior should warrant a different result. Because it can not be determined at this point whether the superior would have approved the plea, defendant is entitled to a new trial.

/s/Harold Hood